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No. 75-1484

In the Supreme Court of the United States

OCTOBER TERM, 1976

PHILIP LUBRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 529 F. 2d 633.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 30, 1975. The petition for a writ of certiorari was filed on April 14, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether testimony by a government agent as to instructions he gave to an informant, who had died prior to trial, was properly admitted into evidence.

2. Whether the government's summation was improper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and two co-defendants were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to five years' imprisonment followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 3a-4a).

The evidence at trial showed that on May 1, 1973, government informant Finn talked with defendants Rizzo and Vitale and later bought an ounce of cocaine from Vitale, using government funds. About the middle of May, Finn made another purchase of cocaine from Vitale. During the negotiations, Vitale told Finn he would go "uptown" to get the cocaine, after which he went to petitioner's jewelry store on 56th Street in New York City. Several times during Vitale's visit he left the store and went to the nearby Gion Bar to make phone calls (Pet. App. 5a).

On August 20, 1973, Finn, who had been given $3,750 in government funds, spoke with Rizzo at the Gion Bar and was introduced to petitioner. Petitioner and Finn then walked to the Gaiety East Luncheonette. About five minutes later, Finn left the luncheonette, a bulge showing in his left front pocket. He thereafter gave government agents 112.2 grams of cocaine (Pet. App. 5a).

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[1]The indictment charged conspiracy to distribute cocaine (Count 1), distribution of 102 grams of cocaine by co-defendant Vitale on May 11, 1973 (Count 2), and distribution of 112.2 grams of cocaine by petitioner on August 20, 1973 (Count 3). The defendants were convicted as charged, except that petitioner was acquitted on Count 3 (Pet. App. 4a).

On October 4, 1973, petitioner entered an apartment building near his jewelry store, followed shortly thereafter by Finn. About twenty minutes later, Finn left the building and met government agents at a predetermined spot. The agents gave him $6,400 in government funds and instructed him to buy a quarter kilo of cocaine. Finn reentered the apartment building and thereafter returned to the government agents with the cocaine (Pet. App. 6a).

ARGUMENT

1. Petitioner contends (Pet. 8) that the prosecutor improperly asked a number of questions of narcotics agent Peterson in "an obvious attempt to fill the gaps in his case" caused by the untimely death of informant Finn. The questions concerned Peterson's recruitment of Finn as an informant, Peterson's instructions to Finn in August 1973 to purchase a quantity of cocaine from an individual known to Peterson only as "Philly", the provision of $3,750 in government funds to Finn, and a meeting with Finn in October 1973, when Finn was instructed to buy a quarter kilo of cocaine from petitioner, for which he was given $6,400 (Pet. 8-10). We rely primarily on the answer to petitioner's contention given by the court below (Pet. App. 9a-10a):

> The instructions by the principal, Peterson, to his agent, Finn, immediately preceding Finn's meeting with Lubrano and the other defendants were relevant to aid the jury in understanding the background events leading up to the crimes in question. *United States* v. *Ruggiero*, 472 F. 2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S. Ct. 2772, 37 L. Ed. 2d 398 (1973); *United States* v. *Manfredonia*, 414 F. 2d 760, 765 (2d Cir. 1969). Although they were inadmissible as proof of the matters asserted, if a limiting instruction had been requested, it might well have been given. *Manfredonia, id.*

We point out additionally that Peterson testified only to what he himself said, not what the informant said, and Peterson was fully available for cross-examination. His testimony was thus not hearsay (see Rule 801(c), Fed. R. Evid.), petitioner was not deprived of his right of confrontation and, as the court of appeals noted, the evidence was relevant to an understanding of other testimony as to petitioner's action.[2]

2. Petitioner also seeks the Court's consideration of a contention, urged below only on motion for rehearing (Pet. 17), that the prosecutor's summation deprived him of a fair trial. In summation, petitioner's counsel argued (Tr. 880):

> And that's why in a lot of cultures from thousands of years ago it has been written that no man should be convicted on the testimony of an individual like Finn, and he's not even here with his testimony. No man should be convicted on Finn's actions, Finn's information and Finn's testimony, no one. But he's getting paid more for this than for his trouble to come to court even if he were to come to court. He's interested in the outcome of the case, he's a scoundrel and a rogue. And he's not despite Mr. Timbers and these agents efforts, and I will show you that's plastic, he's not corroborated by even one other witness, and I am going to show you that concerning Lubrano. So you not only are asked to convict Lubrano on the testimony of one witness, but one witness who is absent, and one witness who is not corroborated.

[2]Petitioner's reliance (Pet. 14) on *Favre* v. *Henderson*, 464 F. 2d 359 (C.A. 5), is misplaced. In *Favre* the prosecutor elicited answers from a police officer as to information he had received from an anonymous source, information which indicated the guilt of the accused.

Defense counsel on several occasions told the jury, "Finn isn't here to testify" (Tr. 882, 885). Government counsel made the following reply, and this is the only place where a defense objection was made (Tr. 890-891):

> Any difficulty that there is in this case results from the fact that, completely beyond anybody's control, the key person in the case, Tony Finn, is not here available to testify and to tell you what happened.
>
> You noticed that during the trial the defense lawyers were very careful to ask each witness, "of your own knowledge." They didn't want you to hear what Tony Finn could have told you about what happened in these transactions.
>
> MR. HOCHHEISER: I must object to that, your Honor. I must object to preserve the record. The Court of Appeals says so. I must object to that comment.
>
> THE COURT: Your objection is registered.
>
> MR. HOCHHEISER: Is it overruled, your Honor?
>
> THE COURT: Overruled.

The clear implication of defense counsel's remarks was that petitioner had been disadvantaged by Finn's absence from the trial. The prosecutor was justified in answering this by calling the jury's attention to the fact that Finn's absence was not caused by the prosecution and was not necessarily to the prosecution's advantage. The district court did not abuse its discretion in overruling petitioner's objection.

Petitioner's further objection, not raised at trial, that it was improper for the prosecutor to tell the jurors to use their "common sense" as to what was said at one of the

meetings of the conspirators (Pet. 17) lacks substance and clearly does not rise to the level of plain error. Lawyers for both sides in a criminal trial commonly and quite properly exhort the jurors to use their common sense in evaluating the evidence and drawing inferences therefrom.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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